UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

PENN RACQUET SPORTS, INC.[1]

Employer

and **Case 28-RD-942**

JOHN D. SWAN, an Individual[1]

Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC on behalf of LOCAL 3937[2]

Union

DECISION AND ORDER

Petitioner John D. Swan has filed a petition seeking an election in a unit of employees represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, on behalf of Local 3937 (Union), and employed by Penn Racquet Sports, Incorporated (Employer). The Union contends that the parties' collective-bargaining agreement has automatically renewed, does not expire until July 15, 2006, and therefore serves as a bar to the election petition. The Employer asserts that the agreement between the parties has expired and thus cannot serve as a bar to the petition. I find that the parties' collective-bargaining agreement has, in fact, automatically renewed and does not expire until July 15, 2006. Based on the reasons set forth more fully below, I shall dismiss the petition because a collective-bargaining agreement existed when the petition was filed on October 21, 2005.

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[1] The name of the Employer and Petitioner are set forth in accordance with the stipulation reached by the parties at hearing.

[2] The name of the Union is set forth in accordance with the stipulation reached by the parties and the Union's website. See, www.uswa.org.

DECISION

Under Section 3(b) of the National Labor Relations Act, herein called the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated that the Employer is an Ohio corporation with a manufacturing facility in Phoenix, Arizona, engaged in the business of manufacturing tennis and racquet balls. During the 12-month period ending October 21, 2005, the Employer, in conducting its operations described above, shipped goods valued in excess of $50,000 directly to points outside of the State of Arizona. The Employer is engaged in commerce within the meaning of Section (2), (6), and (7) Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The Union is a labor organization within the meaning of Section 2(5) of the Act, and represents certain employees of the Employer.

4. **Statutory Question:** As more fully set forth below, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

A. Facts

The Union is the representative of the Employer's production warehouse and maintenance employees.[3] The Employer and the Union have been parties to a series of collective-bargaining agreements, including an agreement covering unit employees that became effective July 15, 1999 (1999 Agreement). Section 16 of the 1999 Agreement contains an automatic-renewal clause that reads as follows:[4]

> **DURATION AND TERMINATION**
>
> This agreement shall become effective July 15, 1999, and shall remain in full force until 12:00 noon on July 15, 2003. Thereafter, it shall renew itself for yearly periods unless written notice is given by either party to the other not less than sixty (60) days, but no more than seventy-five (75) days, prior to the expiration date or any extension thereof that is desired to terminate or amend the agreement. In the event such notice is given, the parties shall begin

[3] The parties further stipulated that the Union is designated as the exclusive collective-bargaining representative of the following unit of employees: All production warehouse, and maintenance employees at the Employer's Phoenix, Arizona plant located at 306 South 45th Avenue, excluding office clerical employees, guards, plant clerical employees, lead persons, quality control and professional employees and all other supervisors.

[4] Union Exhibit 1 in the record inadvertently excludes the page containing Section 16 of the 1999 Agreement quoted herein. Post-hearing, the parties stipulated that the official record should be amended to include Section 16.

> negotiations within (30) days thereafter, unless otherwise mutually agreed. If negotiations are not completed prior to the expiration day, the Agreement may terminate by either party giving seventy-two (72) hours written notice to the other party.

On May 5, 2003, the Union notified the Employer, by letter, of its desire to modify or amend the 1999 Agreement. On the same date, the Union sent written notice to the Federal Mediation and Conciliation Service (FMCS) and the Arizona State Labor Department that the 1999 Agreement was expiring. The parties then negotiated for a new collective-bargaining agreement. The Employer's bargaining committee included Human Resources Director, Thomas Daoust, and Human Resources Manager, Vickie Moore. The Union's bargaining committee included Manny Armenta, a District Union official, along with four other Union representatives. Not having reached a new collective-bargaining agreement, on June 16, 2003, the parties entered into an extension of the 1999 Agreement by way of a Memorandum of Agreement (MOA), which reads as follows:

> HEAD/Penn Racquet Sports, Inc. (the "Company") and the United Steelworkers of America, on behalf of Local 3937 (the "Union") hereby agree to extend their July 15, 1999 – July 15, 2003 Labor Agreement for a period of one year. Accordingly, the Labor Agreement and current benefits will be extended from July 15, 2003 – July 15, 2004 with a termination date of 12:00 Noon on July 15, 2004.

Daoust drafted the MOA and testified that he prepared it "keeping in line with the requirement of the Employer that we make no changes in working conditions, wages or benefits." After the MOA was signed, no further negotiations occurred during 2003. In April 2004, the parties recommenced bargaining and held a bargaining session on July 15, 2004.[5] Neither party provided notice to the other, the FMCS, or the State of Arizona, that their agreement was ending, that a dispute existed, or of a desire to modify or terminate the agreement. When asked why the Employer did not provide such notice, Daoust testified that he "didn't feel it was necessary." In reply to the same question, Moore stated that no notice was given "[b]ecause we were continuing negotiations with the Union during that time period."

At the July 15, 2004 bargaining session, Daoust told the Union representatives that the contract expired that day and asked if the Union had conducted a strike vote. Armenta replied that the Union did not intend to strike, but wanted to reach an agreement and the employees would continue working during negotiations. The bargaining session ended with no agreement. Daoust, who retired from the Employer in September 2004, asserted at hearing that neither party had taken the position that there was an effective collective-bargaining agreement in place after July 2004.

[5] No negotiations occurred from May 1 to May 16, 2004, which was the 60-75 day notice period pursuant to the automatic-renewal clause in the 1999 Agreement.

From July 15, 2004, to the date of the hearing, the Employer continued to adhere to the terms of the 1999 Agreement. The Employer has not made any changes to the employees' wages, health insurance, or other terms and conditions of employment. Moreover, the Employer continues to withhold union dues pursuant to the dues-checkoff clause, and continues to accept and process contract grievances. No arbitrations have occurred because all grievances have been resolved by the parties prior to arbitration.[6] There have been no work stoppages, strikes, or lockouts.

During the remainder of 2004, the parties exchanged correspondence regarding a new collective-bargaining agreement. On August 16, 2004, the Union sent a letter to the Employer setting forth terms of what the Union believed was a "tentative agreement," and noting that they would submit the agreement to their members for ratification. The Employer replied, protesting the terms outlined by the Union and insisting that no such agreement had been reached.[7] In a reply on August 19, 2004, the Union indicated its availability to meet and discuss health insurance issues along with "any other opened issues of our 2004 negotiations" and proposed dates for negotiations. The parties met again for negotiations on November 10, 2004.

At the November 10 bargaining session, the Employer's negotiating committee consisted of Moore,[9] Employer counsel Nathan Niemuth, and a transcriber from Niemuth's law firm. The Union's committee consisted of Armenta along with four other Union representatives. The record does not reflect what was discussed at this session.

The parties met again on April 4, 2005, with the same bargaining committee members present. At this meeting the Employer withdrew its prior contract offer and presented what Moore described as "a new comprehensive offer based on changing business conditions." The Union did not respond to the offer, and no other negotiating sessions have been held. However, the parties have exchanged correspondence regarding negotiations. On June 9, 2005, Niemuth sent the Union a letter asserting that the parties' previous contract had expired and inquired as to whether the Union was prepared to sign the Employer's proposed April 2005 agreement.

The Union did not reply to the letter, and Niemuth sent another letter on June 27, 2005. In this letter Niemuth noted that the Employer's proposed agreement addressed issues of vital importance that needed to be "implemented quickly." Once more the Union did not respond. Niemuth sent another letter to the Union on July 11, 2005, again asserting that the contract had expired and emphasizing the desire to have the Employer's proposed agreement implemented quickly. The letter also warned the Union that if the Employer did not receive a response, it would conclude that negotiations were at an impasse and would arrange to implement the provisions in its April 2005 proposed agreement. The next day, the Union replied with a letter asserting that there was no impasse and inquiring as to available dates for continued negotiations.

[6] Moore testified that she was not aware of any grievances ever being arbitrated by the parties.
[7] The primary issue of contention between the parties was the cost of employee medical coverage.
[9] Moore assumed Daoust's responsibilities upon Daoust's retirement in September 2004.

Correspondence followed regarding proposed negotiating dates, and on October 20, 2005, the Union submitted a contract proposal to the Employer. On October 21, the Petitioner filed the instant petition. On the same date the Employer submitted to the Union a contract offer described as a "last best offer." The Union replied by letter dated October 26, 2005, stating that it would present the offer to its membership the following week.[10]

A hearing was held in this matter on November 8, 2005. All parties were present and afforded an opportunity to present evidence. At the hearing, the Employer and Union argued that the specific terms of the MOA are unambiguous and parol evidence should not be allowed to interpret the parties' intent with respect to the MOA. After the hearing closed, the Employer and Union submitted post-hearing briefs.[11] The Union's brief was hand-delivered to me, and its certificate of service shows that it was served upon the Employer by United States mail.

On November 23, 2005, the Employer filed a motion to strike the Union's brief and a motion to supplement the record. Citing Section 102.114 of the Board's Rules and Regulations, the Employer argues that I should strike the Union's brief from the record because it was hand-delivered to me but served upon the Employer by mail. Regarding its second motion, the Employer attached a post-hearing letter disseminated by the Union to its members and asks that the letter be included in the record. The letter implies that a decertification vote will be forthcoming, sets forth various benefits that the Union claims it achieved for its members, including a two-day Thanksgiving holiday, and ends by wishing all a safe and happy Thanksgiving. The Union opposes both of the Employer's motions, and the Petitioner has taken no position.

B. Position of the Parties

The Union asserts that the explicit terms of the MOA extended all of the provisions of the 1999 Agreement, including the automatic-renewal clause. Since neither party has ever provided written notice to terminate or modify their agreement during the 60-75 day window period designated in the automatic-renewal clause, the Union argues that the 1999 Agreement was extended for one year in July 2004, and again for another year in July 2005. Accordingly, relying upon *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), the Union argues that the parties' contract does not expire until July 15, 2006, and serves as a bar to the petition.

The Employer argues that the terms of the MOA show that the contract expired on June 15, 2003. Accordingly, the Employer argues that there is no current contract between the parties to bar the petition. Furthermore, relying upon *Lewis Engineering & Manufacturing Co.*, 100 NLRB 1353 (1952), and *New Jersey Porcelain Co.*, 110 NLRB 790 (1954), the Employer argues that where there is a date certain in a contract extension agreement, the Board will void the automatic-renewal provision from the extended agreement.

[10] The record is silent as to whether the Union actually presented this offer to its members.
[11] The Petitioner did not submit a post-hearing brief.

Finally, the Employer asserts, citing *Long Island Head Start Child Development Services.*, 345 NLRB No. 74 (2005), that by entering into negotiations for a successor agreement, the Union waived the automatic-renewal clause's requirement for timely written notice of termination and, therefore, the 1999 Agreement did not automatically renew.

The Petitioner has taken no position with respect to the issues.

C. Post-hearing Motions

I find an insufficient basis to grant the Employer's post-hearing motions for the following reasons. The Employer asserts that the Union failed to satisfy Section 102.114 of the Board's Rules, and as a result service upon the Employer was unjustifiably delayed. Section 102.114 states, in part, that "[u]nless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner." (emphasis added). However, with respect to representational proceedings before a Regional Director, the Board has promulgated specific rules in Section 102.67 regulating the filing of briefs and service upon the parties. Therefore, I find that Section 102.67 applies as opposed to Section 102.114.

Section 102.67 provides, in part, that "[a]ny party desiring to submit a brief to the Regional Director shall file the original and one copy thereof . . . after the close of hearing . . . Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief." The Employer received a copy of the Union's brief by mail. Therefore, the Union complied with Section 102.67 with respect to service upon the Employer. Moreover, even if the Union's service upon the Employer was technically incorrect, the Board generally does not reject an improperly served document absent a showing of prejudice. *Century Parking, Inc.*, 327 NLRB 21 fn. 7 (1998). The Employer has shown no prejudice. Accordingly, this portion of the Employer's motion is denied.[12]

With respect to the Employer's motion to supplement the record, the Employer asserts that the Union's post-hearing letter contradicts the Union's position at hearing that a contract bar exists. However, the letter is essentially a reminder of the benefits the Union claims to have achieved for its members, including a two-day Thanksgiving holiday. Therefore, the letter is little more than preemptive campaigning, in the event of a decertification vote, and has no significant probative bearing as to whether a contract bar actually exists. Accordingly, I deny the Employer's motion.

[12] I note that the certificate of service attached to the Union's brief indicates that it was served only upon the Employer and not upon the Petitioner. From the various certificates of service it appears that the Petitioner did receive the Employer's brief, its post hearing motions, and the Union's opposition. Having been served with the Employer's motions and the Union's opposition, the Petitioner is certainly aware that the Union has filed a post-hearing brief. Since no party has raised the issue as to whether proper service of the Union's brief was effectuated upon the Petitioner, I will not address the issue.

D. Analysis and Determination

Although it is not part of the Act itself, the Board has applied its contract-bar rule in various forms almost since the inception of the Agency. *Dominick's Finer Foods, Inc.*, 308 NLRB 935, 945 (1992), enfd. 28 F.3d 678 (7th Cir. 1994). Pursuant to the rule, an election petition cannot be processed during the term of a collective-bargaining agreement, unless the petition is filed more than 60 days, but less than 90 days, before the expiration date of the contract.[13] *Leonard Wholesale Meats,* 136 NLRB 1000 (1962). The purpose of the rule is to provide for stability in labor relations and to permit the benefits of collective bargaining to come to fruition throughout a full contract term. *Dominick's Finer Foods,* supra. Automatic-renewal provisions, such as the automatic-renewal clause herein have been widely used in collective-bargaining agreements, and the Board has long held that an automatically renewed agreement bars an election petition filed during the term of the renewed contract. *ALJUD Licensed Home Care Services,* 345 NLRB No. 88 (2005). With respect to interpreting a collective-bargaining agreement, unless the agreement is ambiguous, parol evidence is not allowed to determine the intent of the parties. *CJC Holdings, Inc.*, 315 NLRB 813 fn.1 (1994), enfd. 97 F.3d 114 (5th Cir. 1996); *Commonwealth Communications, Inc. v. N.L.R.B.*, 312 F.3d 465, 468 (2002). An unambiguous collective-bargaining agreement is limited to the language contained in its four corners. Id.

I find that the MOA is clear and unambiguous and by its specific terms incorporates all of the provisions of the 1999 Agreement, including the automatic-renewal clause. Therefore, since timely notice of termination or modification was not provided by either party in 2004 or 2005, the 1999 Agreement automatically renewed in July 2004, and again in July 2005. Accordingly, the existing contact between the parties does not expire until July 15, 2006, and serves as a bar to the current petition.

In concluding that the 1999 Agreement automatically renewed, I find that the Board's holding in *Abbott House, Inc.*, 272 NLRB 78 (1984), is instructive. In *Abbot House*, the employer and union were signatories to a collective-bargaining agreement containing an automatic-renewal clause providing for annual renewal unless timely notice of intent to amend or terminate the agreement was presented. Id. at 79. The parties then entered into a stipulation extending the collective-bargaining agreement subject to certain specific modifications. The stipulation stated that the "existing collective-bargaining agreement shall be extended for an additional term as expressly hereinafter modified. . . . The term of the successor agreement is for (2) years from July 1, 1981 to June 30, 1983, with a wage and mileage reopener on July 1, 1982." Id. at 79.

On May 2, 1983, the employer received a letter from the union proposing negotiations to modify the underlying contract. The employer refused to bargain, contending that the stipulation incorporated the terms of the automatic-renewal clause in the underlying contract. Accordingly, because the union's notice was one day late, as per the automatic-renewal clause's notice provision, the employer contended that the contract had automatically

[13] Different window periods exist in the health care industry and for seasonal operations, which are not pertinent to the facts herein.

renewed. The union and the General Counsel, who issued complaint based upon the employer's refusal to bargain, argued that the stipulation expired on June 30, 1983, and did not incorporate the automatic-renewal provision of the extended contract.

The Board in *Abbott House* adopted the ALJ's decision dismissing the complaint in total. The ALJ found that, by extending the underlying contract, the stipulation clearly and unambiguously incorporated the automatic-renewal clause of the extended agreement. Id. at 80-81. The ALJ noted that the stipulation was not a complete self-contained document enabling a reader to discern all of its provisions, but instead required reference to the extended contract. Therefore, the ALJ found that the stipulation only changed the term of the agreement, its effective and termination dates, and thus the automatic-renewal provision, with its timely notice requirement, was incorporated into the stipulation. Id. at 81. Since the union's notice was untimely, the agreement automatically renewed. Id. at 82. Because the terms of the stipulation were unambiguous, the ALJ in *Abbott House* noted that it was unnecessary to consider parol evidence to interpret the parties' intent regarding the stipulation. Id. at 81. Nevertheless, "for the sake of completion" he then analyzed extrinsic evidence further supporting his conclusion. Id. Similarly, in *Day's Hotel of Southfield*, 306 NLRB 949, 954 (1992), the Board adopted the ALJ's decision which concluded that the contract extension agreement adopted the automatic-renewal clause in the underlying contract despite the fact the extension agreement contained a specific expiration date.

Similarly, I find that the parties' MOA clearly and unambiguously incorporated the 1999 Agreement's automatic-renewal clause. As in *Abbott House*, the MOA by its terms is not a complete, self-contained document enabling the reader to discern all of its provisions. Instead, it requires reference to the 1999 Agreement which, pursuant to the terms of the MOA, was extended in its entirety. Thus, as in *Abbott House*, the MOA's July 15, 2004 date "only changed the term of the agreement." Id. at 81. Therefore, a party wishing to forestall automatic-renewal is required to provide timely written notice during the clause's 60-75 day window period. Because no such timely notice was provided in 2004 or 2005, the 1999 Agreement automatically renewed and will not expire until July 15, 2006.

Since I find that the MOA is unambiguous, the admission of parol evidence is unwarranted to interpret the parties' intent. Notwithstanding this conclusion, I find that the Employer's conduct also supports my finding. Specifically, the Employer has continued to completely abide by all terms and conditions set forth in the 1999 Agreement, including the grievance procedures and dues-checkoff clause. Under extant Board law, which I am required to follow, it is established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation. See, *Hacienda Hotel Inc*., 331 NLRB 665, 666 (2000).[14] Therefore, continuing dues-checkoff can be treated as an employer's acknowledgement that a collective-bargaining agreement remains in force.

[14] The Ninth Circuit has vacated the Board's decision in *Hacienda Hotel* and remanded the case to the Board to articulate a reasoned explanation for its dues-checkoff rule or to adopt a different rule. *Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578 (9th Cir. 2002). The Board has yet to issue its opinion on the remand. Regardless, the cases cited in *Hacienda Hotel* properly note the Board's long-standing precedent for the proposition that an employer's dues-checkoff obligation terminates with expiration of the contract that created the requirement. These cases have not been specifically overruled by the Board.

OPEIU, Local 95 v. Wood County Telephone, 408 F.3d 314 (7th Cir. 2005). Finally, the MOA was drafted by the Employer. I find that any ambiguities therein are to be construed against the drafter. *Inta-Roto, Inc.*, 252 NLRB 764, 770 (1980), enfd. 661 F.2d 922 (4th Cir. 1981).[15]

The Employer's reliance on the Board's contract bar policy as set forth in *Lewis Engineering & Manufacturing Co.*, 100 NLRB 1353 (1952), and *New Jersey Porcelain Co.*, 110 NLRB 790 (1954), is unpersuasive as these cases predate *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), where the Board substantially modified its contract bar rules. In *Lewis Engineering*, a contract bar case, the Board held that a contract extension agreement containing a date certain would be interpreted so as to negate the automatic-renewal provision of the extended contract. *New Jersey Porcelain*, also a contract bar case, relied upon *Lewis Engineering* in reaching a similar conclusion.

Both *Lewis Engineering* and *New Jersey Porcelain* were issued *before* the Board's decision in *Deluxe Metal Furniture Co.*, where the Board revamped its contract bar regulations. Thus, I find that *Deluxe Metal Furniture Co.* both explicitly and implicitly overruled *Lewis Engineering* and its progeny. See *Deluxe Metal Furniture Co.*, supra at 999 fn. 8, where the Board specifically overruled *Lewis Engineering* to the extent it was inconsistent with the Board's new rule on the timeliness of filing an election petition during the term of a collective-bargaining agreement. Moreover, the Board's holding in *Abbott House* clearly indicates that it no longer abides by the propositions relied upon by the Employer in *Lewis Engineering* and *New Jersey Porcelain*.

Similarly, the Employer's reliance on *Long Island Head Start Child Development Services*, 345 NLRB No. 74 (2005), for the contention that the Union waived the automatic-renewal clause's timely notice requirement by entering into negotiations for a successor agreement, is unpersuasive. While in some instances, such as in *Long Island Head Start*, the Board has found waiver in the context of an alleged unfair labor practice, it has refused to apply this rule to representation proceedings involving a contract bar.[16] Thus, in *Deluxe Metal Furniture Co.*, the Board specifically decided to eliminate its then existing "rule that a party receiving a late notice under the automatic-renewal clause may, by conduct with respect thereto, waive its belatedness, thereby having the contract treated as though timely notice had been given." Id. at 1002. Instead, untimely notice will "be treated merely as a request for modification by mutual assent unless the parties clearly terminate the contract." Id. Since then, in contract bar cases, the Board continues to find that, by negotiating for a successor agreement, a party does not waive the timely notice requirement of an automatic-renewal provision. See *Moore Drop Forging Co.*, 168 NLRB 984, 985 (1967); *Empire Screen Printing, Inc.*, 249 NLRB 718, 718-719 (1980). The Board has not indicated that it has overruled *Deluxe Metal Furniture Co.* and its progeny on this issue with respect to

[15] The fact that an automatic extension provision has been included in the parties' previous collective-bargaining agreements, and that the automatic-renewal clause's timely notice provision was relied upon to begin the negotiations which culminated in the MOA, further support a finding that the parties intended the MOA to include the automatic-renewal provision of the 1999 Agreement. *Abbott House, Inc.*, 272 NLRB at 81.

[16] *Ideal Can Co.*, 219 NLRB 59 (1975), is distinguishable since the Board found that the parties had actually reached a new agreement, incompletely executed, that superseded the agreement the employer claimed had automatically renewed.

representation proceedings. Therefore, by negotiating with the Employer, I find that the Union did not waive the automatic-renewal clause's timely notice requirement.

Based upon the foregoing, and the record as a whole, I find that the 1999 Agreement automatically renewed in July 2004, and again in July 2005. I find that the contract between the parties is in effect until at least July 15, 2006, and serves as a bar to the petition in this matter. Accordingly, in these circumstances I will dismiss the petition as untimely.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

REQUEST FOR REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC, 20570. The Board in Washington must receive this request by December 22, 2005. A copy of this request for review should also be served on me.

DATED at Phoenix, Arizona, this 8th day of December 2005.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board – Region 28